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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 46

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The oral opinion of the district court (R. 1364) is reported at 234 F. Supp. 85; its findings of fact and conclusions of law (R. 1373) are not reported.

JURISDICTION

This civil antitrust suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4. The final judgment of the district court (R. 1400) was entered on September 14, 1964. The notice of appeal to this Court was filed on November 12, 1964 (R. 1402). Probable jurisdiction was noted on

March 15, 1965 (380 U.S. 940; R. 1403). This Court has jurisdiction of the appeal under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29.

STATUTE INVOLVED

The pertinent provisions of Sections 1 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, 4, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

QUESTIONS PRESENTED

1. Whether the agreement between General Motors and each of its Chevrolet dealers in the Los Angeles area forbidding the dealer to sell cars through discount houses unreasonably restrains trade in violation of Section 1 of the Sherman Act.

2. Whether the Chevrolet dealers in the Los Angeles area illegally conspired among themselves and with General Motors to suppress such sales.

STATEMENT

1. THE COMPLAINT

On August 30, 1962, the United States filed a civil suit under Section 4 of the Sherman Act charging General Motors Corporation and three trade associations representing all of General Motors' franchised Chevrolet dealers in the Southern California market area with an unlawful combination and conspiracy to prevent Chevrolet dealers from selling new Chevrolet automobiles through discount houses and so-called referral services (R. 1, 5–6). The dealers were named as co-conspirators (R. 3), and were alleged to have participated in the unlawful combination and conspiracy (R. 5). The complaint alleged that the effects thereof were, among other things, to suppress competition among Chevrolet dealers in the sale of new Chevrolet automobiles in the area involved, and to deprive purchasers of Chevrolet automobiles in the area of the benefits of purchasing such cars in a free competitive market (R. 6). Injunctive relief was sought, prohibiting General Motors from imposing or attempting to impose any limitation or restriction on the persons or classes of persons with whom its dealers may deal, or from exercising any other restraint on the resale of General Motors automobiles by any of its dealers (R. 7–8).

2. THE FACTS

(A) DISCOUNT HOUSE OPERATIONS IN THE LOS ANGELES AREA

The basic facts are largely undisputed. All of the 26 discount houses and referral services involved in this case (GX 1, R. 511–512) were operated by independent third parties who leased or rented space on

the premises of discount department stores such as Federal Employees Distributing Company ("FEDCO"), G.E.M. Stores, Inc. ("GEMCO"), Consumer's Mart of America, Inc. ("CMA"), and Allied Buying Corporation ("ABC Store") (*e.g.*, App. A to Reporter's Transcript, pp. 2, 100, 113, 169, 170, R. 31, 83, 90, 121, 122; see GX 185, R. 833).[1] These discount outlets handled a wide variety of makes and models of different automobile manufacturers including General Motors (see GX 7, 12, R. 622, 634). New-car brochures and other descriptive literature were available at the new-car discount desks (App. A, p. 10, R. 35). In many instances, various models of new automobiles were on display (*e.g.*, GX 7, 141, R. 622, 789). However, no banners or signs bearing the name of any Chevrolet dealer were displayed on the premises, and no Chevrolet dealer advertised that new Chevrolet automobiles were available through discount houses or referral services (*e.g.*, App. A, pp. 100, 170, R. 83, 122).

In a discount house operation, the customer was quoted a price for the particular model, and signed a purchase agreement under which the discount house undertook to supply the car at the stated price (see, *e.g.*, GX 138, R. 777). After the agreement was signed, the dealer who would supply the automobile was identified (*e.g.*, GX 138, 141, R. 777, 789). A referral service would advise the customer that the

[1] The Appendices to the reporter's transcript consist of stipulated abstracts of testimony from the criminal trial (dismissed on defendants' motion for acquittal, 216 F. Supp. 362) against General Motors dealing with the same charge, as well as certain affidavits and the cross-examination of one affiant. "GX" refers to government exhibits; "GM Ex." to the appellee's exhibits.

particular make and model sought could be supplied at a discount, but no price was quoted; the customer was referred to a participating dealer, who then quoted the discount price (App. B, pp. 28–30, R. 183–185). In all instances, the participating dealers transferred title to the new automobile directly to the customer and paid the discount house or referral service an amount agreed upon in advance. The discount house[2] itself did not take title to any of the automobiles involved in these transactions (see GX 146, 147, 149, 151, 152, R. 801–805; GX 154, 156, unprinted).

Most of the dealers who engaged in such selling were located in the City of Los Angeles, but much of the selling was done through discount houses in areas outside the city limits, such as in Orange County. Chevrolet prices there were generally higher than in Los Angeles proper (see map, GM Ex. A, R. 1232).[3]

[2] In the remainder of this brief, the term "discount house" will generally be used to refer both to discount houses and referral services.

[3] Chevrolet dealers in Orange County realized in 1960 about $315 average gross profit per automobile, while dealers within the City of Los Angeles realized about $280 average; the "gross profit" is the difference between the price at which the dealer bought the car and the price at which he sold it. (These figures were derived from the dealers' financial statements for 1960, GX 210, 211, 213–286, unprinted. Each dealer's statement contains total gross profit on sales of new cars and the number of new cars sold. The statements of Orange County dealers are GX 211, 216, 232, 242, 250, 258, 276, 277, 283, 286, unprinted). Since all Chevrolet dealers buy from the manufacturer at the same price, differences in retail selling price may be inferred from differences in gross profits. As noted *infra*, n. 12, p. 29, there was an even greater spread between the gross profit per sale of some of the complaining dealers in Orange County and other outlying areas and those dealers active in selling through discount houses.

While these discount house operations evidently began about 1957, they did not reach substantial proportions until 1960. In that year, some 2,000 Chevrolets (approximately two percent of all Chevrolets sold in the Los Angeles area), plus an unspecified number of other makes and models, were sold through discount houses (R. 374–375; GX 1, pp. 17–18, unprinted).

(B) EFFORTS OF LOS ANGELES CHEVROLET DEALERS TO STOP DISCOUNT HOUSE SELLING

Following this increase in discount house operations in 1960, a number of dealers who did not participate in such selling took steps to end the practice. Beginning in the summer of 1960, some of the dealer-members of appellee Losor Chevrolet Dealers Association, whose membership consisted in large part of Orange County dealers, complained to the Los Angeles Zone Office of Chevrolet about the "cancer" (GX 3, R. 617) of discount house sales. A committee of such dealers, appointed at a Losor meeting in June, also met with R. M. O'Connor, the Chevrolet Los Angeles Zone Manager (App. A, pp. 16–18, R. 38–39; GX 171, R. 818). As the district court found, they "sought to induce General Motors to take some action respecting such selling." Mr. O'Connor agreed to call on each of the dealers who were reportedly selling to discount houses (GX 172, R. 820). As reported to the Losor board in September, O'Connor "requested [those dealers] to please stop this source of supply" (GX 173, R. 821), and it was then planned that a committee "should be appointed from the 3 Dealer organizations to call on the offending dealers to ask their cooperation" (*ibid.*). While taking such action, the Zone

Office personnel indicated that their authority was limited (see Fdg. 34, R. 1391; GX 83, R. 699).

Unsuccessful in their attempts to handle the discount house situation on a local basis either on their own or with the assistance of the Chevrolet Zone Manager, the dealers next decided to bring the matter of discount house selling to the attention of high level officials of General Motors in Detroit, "asking that something be done regarding this situation" (GX 175, R. 824; App. A, pp. 18–22, R. 39–41). At a membership meeting of Losor on November 10, 1960, the Chevrolet dealers agreed to appeal directly to top General Motors and Chevrolet officials in Detroit, by writing letters and sending telegrams to such officials as the President of General Motors and the General Manager and General Sales Manager of the Chevrolet Motor Division and by attempting to have their salesmen do so (Fdgs. 35, 36, R. 1391).

Pursuant to this agreement, Losor dealers and salesmen sent approximately 200 letters and wires to those officials, complaining about the "unfair competition" of discount house selling and seeking the cooperation and assistance of General Motors in the dealers' efforts to eliminate it (see, *e.g.*, GX 14, 65, 83, 86, 90, R. 639, 686, 699, 707, 712). These wires and letters almost uniformly complained about the low prices at which cars were sold by discount houses—for example, that they were "discounted beyond reason" (GX 10, R. 632)—only "a little over the cost * * * to an authorized dealer" (GX 14, R. 639)—and that it was "impossible to compete with these people on a price basis" (GX 69, R. 689). See, also, *e.g.*, GX 12, 13,

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14, 20, 21, 27–38, 50, R. 634, 637, 639, 646, 647, 654–665, 679.

(C) GENERAL MOTORS' DECISION TO ACT AGAINST DISCOUNT HOUSE SELLING

Upon receipt of these letters and wires, General Motors' Detroit Office called the Los Angeles Zone Manager and asked for a complete report on the discount house situation. On November 22, 1960, the Zone Manager, Mr. O'Connor, responded by a letter (GX 22, R. 649) in which he outlined the general operating methods of discount houses, and indicated that the problem had existed in the Los Angeles Zone for the past eight years, but was becoming more serious, with GEMCO alone averaging "over one hundred units of all makes per month." O'Connor identified the discount houses then in operation, and the Chevrolet dealers known to be supplying them with automobiles, and stated that he and other members of the Zone Office "have discussed * * * this matter with all of the dealers engaged in referral or discount house business in an attempt to have them desist." He also reported that "our Dealer Associations have formed a committee to call on the supplying dealers and have asked them and have attempted to persuade them to discontinue this practice."[4] He stated that "we believe

[4] O'Connor was apparently referring to joint action by Losor and the two other dealer associations that were defendants in this action. The O'Connor letter was dated November 22, 1960. While joint action of the three associations was recommended by Losor as early as September (GX 173, R. 821), other evidence (GX 119, R. 750) indicates that it was not until December 15, 1960, that the three associations established the joint committee referred to in the letter (Fdg. 40, R. 1393).

many dealers will cease this type of business if they had any assurance that the account would not be picked up by some other dealer, immediately upon relinquishment" (see, also, App. A, p. 255, R. 163–164; R. 434–437; GX 6, 15, 17, 22, 44, R. 619, 640, 641, 644, 649, 672).

In response to the campaign to enlist its aid, General Motors' top officials formulated and announced a company policy with regard to discount house selling (see Fdg. 36, R. 1391; App. A, pp. 76–79, R. 70–72). The President of General Motors testified that, in the absence of the complaints from the Southern California dealers, the company would not have promulgated any statement on discount house selling "at that particular time" (Tr. 661, not printed). The company's position was communicated in substantially identical letters signed by high company officials and sent to every General Motors dealer in the United States (see Fdg. 36, R. 1391; R. 367–370; GX 115–117, 121, R. 739, 741, 747, 753). The company's letter described the discount house problem and the concern expressed by dealers and their employees, and sought to correct the "unwarranted" implication "that Chevrolet condones these practices as a means of obtaining additional sales" (R. 754). It stated that General Motors had "gone on record" to express "deep concern" about sales outside the dealer organization (R. 755), and that the discount house sales "represent no savings to the public but only result in a dilution of the gross profit on each transaction which would otherwise be made by the franchised dealers" (R. 757). Although noting "the pitfalls * * * to its dealer organization" of so-called "bootleg" sales to unauthor-

ized outlets which then resell to the public, the company "recognized the right of every dealer to lawfully resell his merchandise to anyone" (R. 755). But the company stated that where sales were made by dealers *through* discount houses or referral services, the discount outlet's activities on behalf of the selling dealer may "in some instances represent the establishment of a second and unauthorized sales outlet or location contrary to the provisions of the Chevrolet Dealer Selling Agreements" (R. 756).[5]

The letter concluded (R. 757):

> The Chevrolet wholesale organization will give special attention to these problems. They propose to personally discuss this matter with each of their dealers in those areas where such activity is reported to exist and ask them to review their operations in the light of the critical nature of the problem as it affects the good will of the product they sell, the entire franchise system of distribution, and the validity of any arrangement they may have with a discount house under the provisions of their General Motors Dealer Selling Agreement.

Pursuant to a decision made at the Regional Managers' meeting on December 14, 1960, General Motors instructed Chevrolet personnel to meet personally with each dealer to review the policy letter "for the

[5] The standard General Motors "Dealer Selling Agreement" (GX 1, p. 94, R. 578) provides that "Once Dealer is established in facilities and at a location mutually satisfactory to Dealer and Chevrolet, Dealer will not move to or establish a new or different location, branch sales office, branch service station, or place of business including any used car and/or truck lot or location without the prior written approval of Chevrolet."

purpose of attempting to induce and persuade" each dealer to refrain from selling through discount houses (Fdg. 36, R. 1391).

(D) EFFECTUATION OF GENERAL MOTORS' POLICY IN THE LOS ANGELES AREA

During the final days of December 1960, the manager of Chevrolet's Pacific Coast Region met individually at the Los Angeles Zone Office with at least six Chevrolet dealers in the Los Angeles area then known to be selling through discount houses. None of the dealers had ever before met privately with a Regional Manager of Chevrolet (GX 201, R. 873; R. 449–450; App. A, pp. 102, 145, 183, R. 84, 109, 127). In addition, "it was arranged that Mr. O'Connor, the [Los Angeles] Zone Manager, together with the City Managers in Los Angeles and the Assistant Zone Manager, divide up and hold personal conferences with all the other dealers in the Zone," *i.e.*, those not believed to be involved in discount house selling (GX 201, R. 873; R. 445–446). As explained by a Chevrolet official in Detroit responsible for supervision of west coast sales (GX 201, R. 874), "This was done in order that every dealer with whom the subject was discussed would know that a similar discussion was being held with all other dealers so that if certain dealers should elect to discontinue their cooperation with a discount house, [General Motors] might be able to discourage some other dealer who might be solicited from starting the practice." Mr. Roche, the General Motors vice-president who signed the corporation's letter to Chevrolet dealers, testified (Tr. 398–399) that the dealers

were approached individually by letter and through meeting, "[b]ecause if it were handled on a group basis I suppose we could have been charged with a conspiracy in conspiring with the dealers * * * group to accomplish this discount house referral elimination." The Los Angeles Zone Manager testified that, unless there was complete cooperation by all Chevrolet dealers in the area to refrain from discount house selling, the agreement of any individual dealer "would not have accomplishedw anything" (R. 399, 488).*

The district court found (Fdg. 39, R. 1393) that in these meetings with dealers in the Los Angeles area, Chevrolet personnel "endeavored to induce and persuade each such dealer to refrain from the practice of selling new Chevrolets through discount houses or referral services." The dealers were told about the company's opposition to discount house selling—that it was "wrong" and detrimental to the dealer sys-

*One of the dealers who sold through discount houses, Bruder Chevrolet, stated that he told the Regional Manager that if he "was going to stop selling in this manner * * * the rest of the dealers should stop also" (App. A, p. 105, R. 86). Mr. Cash, the Regional Manager, told Bruder that he "felt certain" the other dealers would quit discount house selling and Bruder left the meeting with the "impression that every dealer who had been doing business with a discount house or referral service would soon quit" (*ibid.*). Another dealer who had sold through discount houses, Warren Riggs, stated that he expressed to Mr. Cash "my hope that he could counsel with other dealers who were of a different opinion and bring them around to our way of thinking" (App. A, p. 118, R. 93). Riggs had earlier written to a Losor official that he would be "most reluctant to discard an account as good as [one of the discount houses] without rather concrete assurance that it would not immediately be picked up by another Chevrolet dealer" (GX 6, R. 619).

tem—and were asked for their agreement (App. A, pp. 102–105, 145–148, 183–186, R. 84–86, 109–111, 128–129; GX 201, R. 873; R. 445–446).[1]

These meetings attained their objectives. As a Chevrolet official reported to an official of the General Motors distribution staff (GX 201, p. 2, R. 874):

> Knowing that the subject was being discussed with all Chevrolet dealers in the [Southern California] area, every dealer [previously involved in discount house selling] voluntarily told Mr. Cash [Pacific Coast Regional Manager] that he would stop any cooperation which he had had with various discount houses in the area. Mr. Cash said that similar reaction was received by Mr. O'Connor [the Los Angeles Zone Manager] and the other wholesale men who had had similar conferences with other dealers in the Zone and that they sincerely believed that, through this voluntary cooperation on the part of all dealers, this serious situation will be diminished to, or near, the vanishing point insofar as Chevrolet products were concerned.

All participation by Chevrolet dealers in discount house selling in the area abruptly ended and existing agreements with discount houses were cancelled (see, *e.g.*, App. A, pp. 102, 116, 148, 163, R. 85, 92, 118, 128). On January 26, 1961, the Board of Directors

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[1] One of the dealers reported that the Regional Manager accompanied a statement that he could not tell the dealer what to do, with a "story" about how he handled his children: "They might disobey "'the first time' but the second time he said he could do something about it." "'I can tell them to stop something. If they don't do it,' he says, 'I can knock their teeth down their throats'" (App. A, 146, 147, R. 109, 110).

of Losor issued the following statement to all of its dealer members (GX 176, R. 825):

> It is the suggestion of your board of directors, in appreciation of the fine job Chevrolet Motors has done in stopping the sale of cars to discount houses, that you and your salesmen send letters or wires to whom you addressed your original complaint to, thanking them for a job well done.
>
> We feel it just as important to thank those responsible for cooperating with us as it is to bring to their attention any malpractice in the automotive industry. Each letter should be in your own wording, expressing your appreciation and your wish to cooperate in any way possible to keep this condition from arising in the future.

At about that time, a number of Chevrolet dealers in the area expressed to General Motors officials their "thanks for your very recent cooperation in assisting to clean up the discount house problem here in Southern California" (GX 130, R. 769; see, also, GX 131, 132, 135, 136, 139, 140, R. 770, 771, 775, 776, 786, 787; GX 137 unprinted). Several, however, pointed out the importance of maintaining "a constant vigil * * * on the subject" (*e.g.*, GX 130, R. 769). One dealer reported to the Zone Manager in January 1961 "the latest information as to what appears to be a flagrant violation of our *discount house* agreement" (GX 134, R. 774, emphasis in original). The Zone Manager also recognized (in a letter to a company official in Detroit) that "complete correction of the problem will require constant scrutiny and follow-up" (GX 127, R. 764).

Earlier, in December 1960, General Motors had planned to retain an investigative firm to "shop discount houses for us" (GX 114, R. 734). In January—that

is, after the letter to and meetings with dealers—Chevrolet's general sales manager instructed its Pacific Coast Regional Manager to begin "shopping" discount house stores (GX 201, R. 873). The Regional Manager discussed these instructions with the Los Angeles Zone Manager. The latter told him that the dealers "intended to do some shopping * * * and that if any information was needed certainly he didn't need to shop right at that time, that I could get information from the dealer on this" (R. 465–466).

At about that time, the three dealer associations established a joint fund to finance "policing" arrangements and employed a professional "shopper" and investigator (App. A, pp. 47–48, 202–206, R. 55, 136–139). Automobiles were thereafter purchased through discount houses by the professional investigator, and by other "shoppers" who typically were employees of a dealer or a dealer association (app. A, pp. 45–47, 49, 68–69, 205–206, R. 53–56, 66, 138; GX 138, 141, 186, 189–193, R. 777, 789, 841, 849–859). They obtained documentary evidence of the transactions, and the investigator made tape recordings of the conversations involved in his purchases. The evidence thus obtained was turned over to the Chevrolet Zone Manager in Los Angeles, who utilized it (as he described it) "in the interest of implementing our program that had been outlined in our letter of December 29 by Mr. Staley [the letter to Chevrolet dealers, *supra*, pp. 9–10]" (R. 459).

He testified that Losor dealers first informed him in February 1961 that "they were going to shop a car through a discount house" and asked whether he

wanted the information they obtained (R. 455–456). "I told them I did"; he "wanted this information to go back to the dealer again and again review this letter, this Staley letter or Roche letter * * * to again review it carefully with him and again try to persuade him to cease doing business through the discount houses" (R. 455–457). On about February 23, he first took over a car bought on behalf of Losor through a discount house, and arranged for its repurchase by the selling dealer. On the Losor dealers' instructions, he transmitted the money that he received in the transaction to a representative of the three dealer associations (R. 457–459; App. A, pp. 247–250, R. 159–161). Subsequently, the Chevrolet Zone Manager or his subordinates called in offending dealers; on at least seven occasions, confronted them with the evidence, which often involved the play-back of a tape recording of the discount house transaction; and asked them whether they did not wish to repurchase the car purchased by the shopper-investigator (App. A, pp. 149–150, 204–207, 256–258, 260–263, R. 111, 137–139, 164–167; Tr. R. 460–461).[8] Each dealer did so, often

[8] One of O'Connor's Zone Office subordinates described one such confrontation of a dealer with the tape recording as follows:

> Q. When the tape recording was concluded, did Mr. Cashman [the dealer] appear at all embarrassed to you?
>
> A. I would say so, yes, sir.
>
> Q. So that, after playing this tape recording to which you have testified Mr. Cashman appeared embarrassed, no doubt you asked him a question, did you not?
>
> A. I believe that I did. I believe I asked him if he wished to buy the car back.
>
> Q. And what did he say to you, Mr. Thompson?

at a financial loss (App. A at 258, 260–263, R. 165–167). Evidently as a result of the dealers' shopping activity, General Motors did not carry out its plans to conduct its own investigations (R. 466). The dealers' shopping activity ended at or about the time the grand jury commenced its investigation of this matter, early in May 1961 (App. A, p. 205 R. 138, R. 465).

3. THE DECISION BELOW

At the conclusion of the trial, the district court delivered an oral opinion in favor of the defendants and directed counsel for defendants to prepare findings of fact and conclusions of law (R. 1364–1372). General Motors' findings and conclusions were adopted with only two modifications (R. 1373–1399).[9]

The district court held that neither General Motors nor the dealer associations had violated the Sherman Act in eliminating discount house selling of Chevrolets in the Los Angeles area. The court ruled that such sales violated the prohibition in the Chevrolet dealer franchise agreements against establishing a

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A. As I recall, he said he certainly did.

Q. And Mr. Thompson, did you expect him to say, "No"?

A. No, I don't think I did, no, sir.

[App. A, pp. 257–258, R. 165.]

[9] Upon objection of the United States, the court changed General Motors finding 35, which stated that Losor encouraged its members to write to General Motors, finding instead that at the Losor meeting on November 10, 1960, the Chevrolet dealers present "agreed" to complain to General Motors and to attempt to have their salesman do so (R. 1391). The district court also added a conclusion of law (No. 9) that "the government's proof failed to support the allegations of its complaint" (R. 1399).

"branch" location without the prior approval of Chevrolet, the discount house being a dealer "outlet" or "location" (Concl. 2, R. 1396; see, also, Concl. 3, R. 1397).[10] The location restriction itself, the court held, was valid, because it gave each dealer "a 'head start' in the market of sufficient sales potential to provide him a fair profit opportunity": if dealers could establish sales outlets in an area which General Motors had found to be adequate to support only one selling outlet, the business of the authorized dealer in that area would be so diluted that he could not stay in business, and General Motors "would lose the competitive advantage of having a sales, service and parts facility" in that area (Fdg. 17, R. 1383–1384). The court found it "difficult to conclude that the exclusion of discount houses, which supply no facilities for repairs or the supply of genuine Chevrolet parts, or who fulfill [no] warranty obligations or who do [nothing], in fact, except offer for sale a Chevrolet automobile—or a competing automobile if the customer indicates a preference—would constitute an unreasonable restraint of competition violative of the Sherman Act" (Oral opinion, R. 1369). The court concluded that General Motors' actions in this case were undertaken in "preservation of [its] franchise system," and promoted, rather than impaired, inter-

[10] The court also stated (Concl. 2, R. 1396–1397) that discount house selling violated that part of the Chevrolet Dealer Selling Agreement forbidding a dealer to transfer his personal sales obligations under the agreement to other parties. A General Motors vice-president had testified, however, that he was aware of no transfer of a dealer's sales obligations by the arrangements with discount houses in this case (R. 399).

brand and intrabrand competition (Fdgs. 25, 33, 37, 45, Concls. 1–2, R. 1388, 1390–1393, 1395–1397).

ARGUMENT

Introduction and Summary

General Motors entered into agreements with each of its Los Angeles area dealers forbidding the dealers to sell through discount houses. In the court below, General Motors argued that such a prohibition is implicit in the provision of its standard franchise agreement by which every Chevrolet dealer agrees not to establish a branch location without the approval of General Motors. The basic question in this case is whether the agreement prohibiting dealers from selling through discount houses violates Section 1 of the Sherman Act because it restrains trade unreasonably. The court below held it reasonable and lawful.

In *White Motor Co.* v. *United States,* 372 U.S. 253, this Court for the time being declined to extend to other "vertical" restraints the *per se* rule which prohibits a manufacturer from agreeing with his distributors upon a resale price; in that case the distributor had agreed not to sell to certain customers and not to sell outside the territory assigned him by the manufacturer. For purposes of this case, we accept that some restrictions on distribution may, in some instances, be reasonable as measures that on balance promote competition by enabling a company to compete effectively with other brands through an efficient and economical distribution system without unduly restricting competition among its distributors. However, when vertical restraints are shown to be

anticompetitive in nature, we believe that the presumption should be against them, and that it is incumbent upon those manufacturers employing them to prove that they are necessary to promote or preserve competition, and no more restrictive in nature or in duration than conditions require.

Accordingly, we undertake in this brief to consider General Motors' prohibition of sales through discount houses in light of the relevant circumstances with respect to its competitive effects and possible justifications. We first show that the adverse effects of the challenged restriction upon competition are very substantial and far-reaching, and we argue that where so strong a showing of anticompetitive effect is made by the government the burden is upon the manufacturer to prove that the restriction is nevertheless justified because it is necessary to enable the manufacturer to compete effectively. The major portion of our brief is devoted to demonstrating that General Motors here failed to make the required showing—and we also argue that even if a simple balancing test is proper, the record establishes that the competitive harms of the challenged restriction far outweighed any benefits.

The basic issue whether General Motors engaged in illegal concerted activity with its Los Angeles Chevrolet dealers has a further aspect, which we consider in the second part of our brief. The government contended below, and we contend now, that the evidence also shows that General Motors' Chevrolet dealers in the Los Angeles area entered into a conspiracy among themselves to prevent sales through discount houses; that this conspiracy was designed to prevent price

competition in the retail sale of Chevrolets; that the dealers successfully enlisted the support of General Motors, which became a party to the conspiracy; and that the conspiracy, being basically one among competitors, is *per se* unlawful under Section 1 of the Sherman Act.

We recognize, of course, that merely to enjoin General Motors and its dealers from continuing such a conspiracy could presumably leave the company free to enforce separate vertical agreements to prevent any dealer from selling through a discount house. We believe that an order as broad as that asked in the complaint (Statement, *supra,* p. 3) could be predicated upon a finding of illegal conspiracy alone as appropriate to purge the effects of that conspiracy. But the uncertainty whether such relief would be granted prevents us from arguing that the question whether General Motors may lawfully forbid its dealers to sell through discount houses would be mooted if the Court accepted our conspiracy contentions.

I

THE AGREEMENT BETWEEN GENERAL MOTORS AND ITS DEALERS FORBIDDING THE LATTER TO SELL THROUGH DISCOUNT HOUSES UNREASONABLY RESTRAINS TRADE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT

A. THE ADVERSE EFFECTS OF THE RESTRICTION UPON COMPETITION ARE GRAVE AND FAR-REACHING

1. The record demonstrates the direct and immediate depressant effect of the challenged restriction upon price competition among Chevrolet dealers. Retail prices of Chevrolet dealers in Orange County were

higher than those of Chevrolet dealers located in other parts of the Los Angeles metropolitan area. Although the record does not show why there was this disparity, a proper inference is that it reflected a lack of competitive pressures (whether from other Chevrolet dealers or from dealers in other automobile makes), and that the Orange County dealers were exploiting such lack of competitive pressures at the expense of the consuming public.

Where absence of vigorous competition fosters high prices and profits in a market, new competitors from outside the market are tempted to come in. It was natural, therefore, that the lower-priced Los Angeles Chevrolet dealers would be attracted to areas where prices were higher, such as Orange County. But it was evidently not easy for them to compete directly with dealers actually located there, perhaps because the average automobile purchaser tends not to shop so far outside his immediate area.[11] The device of using discount houses located or having branches in Orange County to act, in effect, as sales agents there made this competition possible.

The prices at which the Orange County dealers sold Chevrolets were sufficiently high that the Los Angeles dealers who sold through discount houses could afford to pay the discounter a commission, make a profit, and still undersell the Orange County dealers. But for the use of these discount houses as sales agencies, the Los

[11] The map following p. 4 of General Motors' Motion to Affirm indicates that, for example, Anaheim in Orange County is more than 20 miles from many points in downtown Los Angeles.

Angeles dealers probably could not have penetrated the Orange County market and the higher price level prevailing in that market might have continued indefinitely. That the sales tactics of the Los Angeles dealers were indeed effective in introducing price competition seems clear from the complaints of the Orange County dealers. It is also clear that General Motors' efforts to prevent sales through discount houses stemmed directly from these complaints.

2. The anticompetitive impact of the challenged restriction is greatly magnified by the position of General Motors in the automobile industry. The domestic automobile industry is dominated by three firms, which in 1960 accounted for 84.2 percent of all domestic new-car sales (*Automotive News,* 1965 Almanac Issue, p. 50). This Court has pointed out that competition is likely to flourish when there are many competing sellers, no one of whom commands a significant share of the market. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 363. Plainly, the structure of the automobile industry is far from the competitive norm. It is surely undesirable to permit the automobile manufacturers, by means of restrictions such as that challenged in this case, to transmit the effects of the high degree of concentration at the manufacturers' level to the retail level. While there are few manufacturers, there are many dealers, and competition at the dealer level should be preserved.

Furthermore, we are dealing here with a brand—Chevrolet—which alone accounts for some 30 percent of the industry's total domestic new-car sales (*Automotive News, supra*). Thus, the magnitude of the area

of competition restrained by the manufacturer's restriction under challenge here is very great, as attested by the fact that in the Los Angeles area alone General Motors in 1960 sold 93,333 Chevrolets to its dealers, for fore than $100,000,000 (GX 1, p. 17). Moreover, through such methods as heavy advertising and annual style changes, General Motors has created a distinct and substantial consumer preference for Chevrolets as differentiated from competing brands. The existence of a strong consumer preference for Chevrolets is suggested by the fact that more than 70 percent of Chevrolet purchasers are repeat customers (R. 301). Thus, Chevrolet is plainly not merely one brand, insignificant in itself, among many. It is in its own right a very substantial and important product market. Accordingly, restrictions upon competition in its sale to the consuming public and the consequent raising of prices are of major economic consequence.

3. The restriction also suppressed the development of an alternative method of merchandising. Discount house selling made available, without need for "bargaining," automobiles of all makes and models at stated low prices. The merchandising technique pioneered by discount sellers has proved to be popular and effective particularly with respect to products which, like automobiles, are purchased primarily on the name, reputation and warranty of the manufacturer (*e.g.*, R. 31; GX 7, R. 622). That this sales tactic met a consumer need is abundantly clear from the record.

4. In addition, preventing dealers from selling through discount outlets may well, in the long run,

injure competition not only among dealers but among the automobile manufacturers themselves. Among the factors that contribute to the present concentration of the industry is the franchise system and the consequent requirement that any new manufacturer establish an extensive chain of costly dealerships to distribute and service his product. Sales through discount houses could presage the emergence of alternative forms of automobile distribution and increase the feasibility of new entry into automobile manufacturing.

B. THE SUBSTANTIAL ANTI-COMPETITIVE EFFECTS OF THE CHALLENGED RESTRICTION ARE NOT JUSTIFIED

If the Court accepts our contention in the preceding subpart—that the anticompetitive effects of the restriction here challenged are indeed grave—we think it follows that the manufacturer, not the government, has the burden of persuasion on the issue of justification (cf. *United States* v. *Philadelphia National Bank, supra,* at 362–366)—if indeed legally recognizable justification there be. But however the burdens be allocated, we submit that it is demonstrable that General Motors' restriction upon sales through discount houses is unjustifiable.

At the outset, we may put to one side a justification frequently advanced for restrictions on distribution: that while limiting competition in the resale of tthe manufacturer's product, they are essential to competition between the manufacturer and manufacturers of competing products because they enable it to break into a market or to avoid business failure. This ground

is inapplicable here. It has not been shown that General Motors' ability to compete against other automobile manufacturers will be impaired if it is not permitted to prohibit its dealers from selling through discount houses. Nor is this a case where General Motors, whether to promote a new product or to penetrate a new area where it had not theretofore sold, offered to restrict sales through discount outlets as an inducement to distributors to handle its product or accept its franchise; Chevrolet was a very well established brand in the Los Angeles area. Thus, if the restriction here challenged is justifiable at all, it is not on grounds of competitive exigency.

We grant, for purposes of this case, that even a large and powerful firm like General Motors may be able to justify certain restrictions on distributors of its products because of their limited adverse impact in the light of the long-range needs of interbrand competition. Suppose, for example, that General Motors, concerned that its goodwill and its ability to market its automobiles may suffer if Chevrolet dealers fail to perform their servicing obligations under the sales warranty promptly and efficiently, requires all of its Chevrolet dealers to maintain adequate parts inventories. We might concede the reasonableness and lawfulness of such a restriction, first, because its actual adverse effect upon competition among Chevrolet dealers is probably trivial, and second, because such a restriction appears reasonably necessary to the efficient (and hence, in the long run, competitive) distribution of General Motors' product. But prohibiting Chevrolet dealers from selling through discount houses, as we have shown, does have pronounced and very grave anticompetitive effects; as presently we show, it is not

necessary for the efficient distribution of Chevrolet automobiles.

There is one more preliminary point to be disposed of. General Motors vigorously argues that the franchise system under which the company and its dealers operate is an efficient method of distribution, and that the restrictions imposed by the standard franchise contract are necessary and proper for the distribution of automobiles. This argument is beside the point. As we shall explain, we are not here attacking the franchise system, albeit it has anticompetitive features. Ours is a narrower challenge to the specific franchise provision that General Motors has interpreted as preventing Chevrolet dealers from selling through discount houses. That provision, whose excision would not endanger the survival of the franchise system in the automobile industry, is an unjustifiable restraint.

1. The business logic of sales through discount houses refutes the argument that the challenged restriction is justifiable as a necessary measure to preserve the franchise system. Suppose that General Motors sold its Chevrolet automobiles at a single price to both its franchised dealers and discount houses. In that event, there probably would be a substantial adverse impact upon the franchised dealers. They would be compelled to compete on equal terms with sellers who had no service obligations, were not tied to a single manufacturer, did not have to invest in very costly showroom facilities, and might be stronger and more diversified merchandisers. But General Motors does not distribute in that fashion. Discount outlets that desire to carry automobiles cannot obtain them from General Motors; their only source is the

franchised dealer. Hence, the franchised dealer has a substantial built-in cost advantage over competing discount outlets which offsets his higher overhead. He buys at the manufacturer's price, while the discount house must price at a level reflecting a profit for the dealer. The dealer's profit is part of the discounter's—but not, of course, the dealer's—cost. The franchised dealer has an additional advantage vis-à-vis the discount house: The consumer would presumably prefer to patronize an authorized dealer, conveniently located, and well-stocked with parts and trained personnel, rather than a discount house—so long as the dealer is reasonably competitive in price.

This means that sales through discount houses are likely to reach substantial proportions only in places where, and at times when, the franchise system fails to produce reasonably competitive results, and retail prices and profit margins of the franchised dealers are out of line or excessive. If prices and margins are reasonably low, there is unlikely to be enough "water" in them to permit (1) the franchised dealer to sell at the discount price and still make a profit, (2) the discounter to undersell competing franchised dealers in his area, *and* (3) the discounter to recover his selling costs and a commission on the transaction. Unless all three conditions are fulfilled, selling through discount houses makes no business sense; where all three conditions are fulfilled, the chances are that retail profits and prices reflect the absence of vigorous com-

petition. In other words, as the facts of this case demonstrate eloquently,[12] selling through discount houses is likely to arise only in response to a failure of the franchise system, and its natural tendency is not to undermine the system but, rather, by breaking the artificial price-and-profit level, to restore the system to competitive functioning. It is a safety valve, pro-

[12] There is a striking comparison between the average gross profit per sale earned by the leading dealers who sold through discount houses, and that earned by the dealers most prominent in the campaign against discount house selling. Among the sellers through discount houses were franchised dealers having gross profits on all sales of $268 per car, $222, $259, $168, and $200. Among the protesting dealers in Orange County and other outlying areas were franchised dealers with average gross profits on all sales of $303, $279, $334, and $356. Compare GX 219, 223, 226, 234, 285 with GX 211, 232, 245, 250, 255, unprinted. See, also, n. 3, p. 5, *supra*. These figures, and the comparison of the general price levels in Orange County and elsewhere, prove the irrelevance of the price survey conducted by Price, Waterhouse & Co. for General Motors (GM Ex. DB). This survey indicated that there was no appreciable difference between the price paid by a customer who bought from a discount house through a franchised dealer and the price he would have had to pay had he bought directly from the *same* dealer (Motion to Affirm, pp. 7–9). The survey compared the wrong things. The effectiveness of price competition is shown by comparing the discount house prices with the prices offered by competing franchised Chevrolet dealers who did not sell through discount houses. The company's study did not make that comparison (App. C, pp. 40–51, 71–73, R. 237–243, 253–254). Indeed, the survey supports our contention that sales through discount houses flourish only where there is a pocket of high-priced dealers, as in Orange County in this case, and that franchised dealers whose prices are not unduly high are not undercut.

tecting rather than impairing efficient distribution of automobiles to the consuming public."[13]

2. The challenged restriction plainly originated at the dealer, not the manufacturer, level. Nothing in the franchise contract expressly forbids selling

[13] The Los Angeles experience tends to confirm that the franchise system would not be impaired by discount house selling. Although some 2,000 Chevrolets were sold in 1960 through Los Angeles area discount houses, no dealer in that area went out of business, General Motors conceded that there was no "impairment in the franchise system at that time," and the company was unable to show that any dealer was affected in any way that differed from the usual impact upon a merchant of vigorous competition by his rivals (R. 374–375). Moreover, since dealers selling through discount houses charged roughly the same price to direct customers as was charged discount house customers, there is no reason to assume the complaining dealers could not meet the "discount" price in their own places of business.

Nor is there anything in the Los Angeles experience to demonstrate that any cars were not properly serviced because they were sold through discount houses. In a sale through a discount house, a franchised dealer is the actual seller and he gives the purchaser a new-car warranty. All Chevrolet dealers have a contractual obligation to General Motors to maintain adequate service facilities, and they are expected to perform warranty service on new Chevrolets regardless of where the cars were purchased (R. 304–305, 352, 442; GX 1, R. 574, 578, 583–584). Persons who actually purchased Chevrolets through discount houses in the Los Angeles area testified that they had no difficulty obtaining satisfactory service under the new car warranty which they received from the franchised dealer who made the sale (App. A, pp. 2, 8, R. 31, 34). While the Chevrolet Zone Manager reported that he had been told that some dealers had shown reluctance to provide new car service, there was no testimony about specific instances or by purchasers who had actually been refused service (R. 441–442), and the Zone Manager acknowledged that the company "would consider it as a serious thing" if a dealer refused to service a new Chevrolet no matter where purchased (R. 442).

through discount houses. The prohibition imposed by General Motors upon such selling is not an express provision routinely inserted in each franchise contract upon the demand of General Motors, but a restraint imposed only in response to dealer demands [14] and thereafter defended as a gloss upon the branch location provision (see, further, pp. 33–35, *infra*). Thus, it was not General Motors that took the initiative in preventing sales through discount houses because it deemed the practice inimical to the efficient distribution of its automobiles—the initiators were the dealers, who were concerned with maintaining high and stable retail prices and profit margins (see pp. 39–40, *infra*). Concededly, General Motors, although it already had "extensive" knowledge of discount house operations (see, *e.g.*, GX 7, R. 622), would have taken no action to eradicate them "at that particular time" but for the "campaign" by the Los An-

[14] General Motors itself stresses that the "branch location" provision was put in its contract 25 years ago to serve exclusively the interests of the company in aggressive distribution (Motion to Affirm, p. 17). Yet, despite its present claim that discount house selling is a clear violation of that provision, General Motors took no remedial action whatsoever until pressure was exerted upon it by the Los Angeles area dealers. Shortly before the December 1960 letter to dealers (Statement, *supra*, pp. 9–10), General Motors officials were still indicating that they lacked legal power to do anything to stop the practice (GX 114, R. 734; GX 83, R. 699). And while the letter did suggest that "in some instances" discount house operations would represent an "unauthorized sales outlet or location" (GX 121, R. 756), the record shows that at the meetings of Los Angeles area dealers with the General Motors Regional Manager and the Zone officials there was no warning or statement that any contract violation was involved in discount house sales (App. A, pp. 103, 147, 184, R. 85, 110, 128; R. 480–481).

geles area dealers (R. 402–403, 410–411; Tr. 661, unprinted, testimony of General Motors' president). As one dealer stated in a letter to Chevrolet's General Sales Manager, discount house selling "is mostly a dealers' association [rather than the manufacturer's] problem" (GX 137, unprinted). In short, the facts here indicate that General Motors' defense of legitimate business justification is strictly an *ex post facto* rationalization; and that the challenged restriction is not rooted in the needs of effective distribution.

This is also shown by the fact that General Motors expressly disclaims any intent to prevent dealers from selling *to*,[15] rather than, as here, *through* discount or other retail outlets. Yet the same harms alleged to flow from the practice here involved would also result if Chevrolet dealers sold directly to discount houses, used car dealers, or other new car dealers. Whether the discount seller's compensation for acting as an outlet for new car sales is expressed as a commission or as a profit on resale can hardly be significant from the standpoint of preserving the franchise system. And it therefore seems wholly implausible that concern for the franchise system was uppermost in the mind of General Motors' officials in forbidding sales through discount houses. Rather, the company's action appears to have been a response to the pressures of the Los Angeles area dealers who desired to limit competition among themselves.

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[15] R. 399–400, 755; General Motors' Motion to Affirm, pp. 3, 6, 15 (fn.). The automobile manufacturers describe sales by dealers to unfranchised outlets for resale as "bootlegging." See Hearings, *Automobile Marketing Legislation*, Subcommittee, House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., p. 360.

3. Nor can the restriction upon sales through discount houses be justified, as the district court thought, on the same grounds as the express limitation in the franchise contract upon the establishment by a dealer of branch locations without the prior approval of General Motors. Such a limitation the district court deemed of the essence of the franchise system. Without conceding that it is in fact a reasonable limitation upon the freedom of action of the dealer, we note the following substantial differences between it and the restriction involved in the present case which indicate that the restriction on discount house selling is both more restrictive on the dealers and less necessary to General Motors:

(*a*) The branch location provision is apparently regarded by General Motors as important to the distribution of its product; it has been included as an express term of the standard franchise contract for many years. So far as appears, the initiative in placing it in the contract was General Motors'. In contrast, the restriction challenged here was, as we have seen, imposed by General Motors only in response to dealer pressure.

(*b*) We may concede *arguendo* that a proliferation of branch locations may impair General Motors' planned spacing of franchised dealers, as it contends, by depriving some individual dealers of a sufficient profit opportunity for them to bear the burdens imposed by the franchise contract in regard to, for example, servicing, showroom display, inventory, and periodic reports; and, further, that if each dealer were free to penetrate the territories of other dealers by the estab-

lishment of branch locations, the dealer's incentive to cultivate intensively his own territory might be reduced. But, as we have seen, there appear to be inherent economic limitations to the expansion of sales through discount houses, limitations not applicable to branch locations. In the branch location situation, the dealer presumably purchases all of the cars sold at his several outlets directly from the manufacturer and pays the same price as other dealers. But a discount house, in contrast, while it avoids the capital expenditure involved in establishing a branch location, must obtain cars from a franchised dealer, and so its cost is necessarily higher than the manufacturer's price to the dealer. There is, accordingly, less likelihood that sales through discount houses could, if unrestricted, so proliferate as to affect the viability of any significant number of franchised dealers.

(*c*) A dealer's branch location, in the eyes of the public, is an authorized General Motors outlet; a discount house, which sells many brands and does not hold itself out to the public to be a dealer in Chevrolet automobiles, is not. The manufacturer's goodwill presumably may be directly affected by the business operations of authorized outlets, and for this reason he may have a valid interest in deciding how many authorized outlets there shall be in each area. That does not mean that he has a right to prevent an authorized dealer from using sales agents who do not purport to be authorized dealers.

(*d*) It is possible that the branch location provision is not intended as an absolute prohibition,

since, in terms, it merely requires the prior approval of the company for any branch location. General Motors might interpret the provision as designed merely to ensure that the company retains reasonable control over the location and physical appearance of any proposed branch. Accordingly, the restriction may be far less drastic than the one challenged here, which flatly prevents any General Motors dealer from selling through any discount house or other retail outlet.

(*e*) The limitation on branch locations is less restrictive upon free competition among dealers in an additional respect. Even if forbidden to establish a branch location, a dealer is not thereby absolutely foreclosed from selling activity outside his immediate area. If the restriction upon sales through discount houses is held invalid, the dealer is free to establish footholds in other territories through precisely the technique involved in this case.

4. The district court also suggested that the public needed adequate service facilities associated with sales outlets. The record shows that in sales through discount houses the franchised dealer who actually makes the sale supplies a new car warranty, and, in fact, provides service (see n. 13, p. 30, *supra*). While a franchised dealer who does not make the sale is nevertheless under obligation to service the car under the warranty (as he would be whether or not the sale was made through a discount house), the manufacturer compensates the dealer for such service costs.

5. Another point that might be cited in justification of the challenged restriction is that the franchised dealer might fail adequately to exploit his as-

signed location and territory if he concentrated on selling through discount houses located in a different area. But there are legitimate, and far less restrictive, techniques open to the manufacturer to compel the authorized dealer to perform his basic franchise obligations—for example, by the use of an area-of-primary-responsibility clause. At all events, the justification is patently inapplicable here. Since 1961, Los Angeles and Orange County dealers have been responsible under the franchise contract for devoting their principal selling efforts to the *same* over-all metropolitan area (GX 1, pp. 10–11, 95–97, R. 606–607).

* * * * *

To summarize this part of our brief: The restriction upon sales through discount houses is highly anticompetitive; therefore, the burden of justifying it in terms of policies compatible with antitrust principles is upon the manufacturer. General Motors argues primarily that such a restriction is a necessary incident to the franchise system of automobile distribution. Without entering upon a discussion of the merits of such a system in the automobile industry in terms of competition and efficiency, we have shown that the restriction is by no means a necessary incident to that system, and can be severed without impairing it. Accordingly, General Motors' asserted justification fails. Moreover, even if General Motors did not have the burden of justification, the record demonstrates that the restriction is substantial and unjustifiable. The agreements which prohibit the dealers from selling through discount houses consti-

tute unreasonable restraints of trade, in violation of Section 1 of the Sherman Act. We emphasize that we are not conceding that the franchise system as used in the automobile industry is in fact justifiable—that whatever efficiencies in distribution it may produce outweigh its anticompetitive effects. We simply regard this broad issue as not raised by the facts of the present case.

II

GENERAL MOTORS' FRANCHISED CHEVROLET DEALERS IN THE LOS ANGELES AREA CONSPIRED WITH EACH OTHER AND WITH GENERAL MOTORS, IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT, TO SUPPRESS THE SALE OF CHEVROLET AUTOMOBILES THROUGH DISCOUNT HOUSES

At the outset of our discussion of the conspiracy issue, it is well to make explicit certain assumptions on which we are proceeding. The first is that the agreements with each dealer barring sales by the dealer through discount houses do not unreasonably restrain trade. For if they do (as we argue in part I of our brief, *supra*), the conspiracy issue is superfluous—General Motors and its Los Angeles area dealers violated Section 1 by making and enforcing such an agreement.

Secondly, we assume that a conspiracy in the circumstances of this case cannot be proved merely by establishing that a number of dealers called upon General Motors to prevent sales through discount outlets—by hypothesis in this part of our brief, a practice that General Motors was entitled to forbid its dealers to engage in. Nor is it sufficient to show that General Motors, by enforcing a restriction imposed

by the franchise agreement (as General Motors interprets it) upon that practice, facilitated parallel behavior (*i.e.*, refusing to sell through discount houses) on the part of its dealers. Both of these approaches would represent, in our opinion, an unwarranted extension of antitrust conspiracy doctrine, because the result of applying their logic would be to deem all vertical restrictions upon distributors *per se* illegal conspiracies.

On the other hand, it is the basic postulate of Section 1 of the Sherman Act that concerted activity by competitors which restricts competition may be illegal where other activity directed toward the same end would not. From this it follows, we think, that not all methods of enforcing even valid vertical restrictions are permissible—that collusive and coercive tactics that traditionally have been condemned under Section 1 even where their objectives are not illegal are also impermissible here, where the object of the conspirators was (on our present hypothesis) to enforce an otherwise legal restriction.

Further, we assume that if a horizontal conspiracy to suppress competition is proved, it is illegal *per se;* the defense of economic justification or lack of substantial adverse competitive effects is not available. See, *e.g., Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U.S. 600; *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457; *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207.

Proceeding on these assumptions, and applying settled principles of antitrust conspiracy doctrine to the undisputed facts of this case, we show in this part of our brief, first, that there was a horizontal conspiracy among the Los Angeles area Chevrolet dealers to suppress price competition by eliminating sales through discount houses, and second, that General Motors was a party to the conspiracy.

A. We do not dispute the right of individual dealers in the Los Angeles area to urge General Motors to exercise what legal rights it might have to prevent sales through discount houses, or their right to discuss the problem with each other. But the dealers went much further. They *agreed*—as the district court itself expressly found—to exert pressure upon General Motors to prevent such selling (Fdgs. 34–36, R. 1391–1392; Statement, *supra*, pp. 7–8). The purpose of their agreement was to protect their retail prices and profit margins against the competitive pressures of the discount sellers.

The complaint of these dealers was that the discount houses were underselling them—that it "was impossible to compete with these people on a price basis" (GX 69, R. 688). As one dealer stated in a letter to Chevrolet's General Manager (GX 12, R. 635):

> These leeches are selling new Chevrolets two to three hundred dollars less than I can afford to deliver one. They inform the people to shop the [franchised] agencies and, "get the prices you can—then come back and save hundreds." What hurts is that it is true!

The entire thrust of the discount houses' new-car selling was to attract the public with the promise of "discount," *i.e.*, lower, prices (see, for example, the advertisements in the record at GX 83, 90, 184, R. 699, 712, 829). The threat posed by sales through discount houses was the threat of vigorous price competition. General Motors' management was advised by its own officials that "one of the real hazards of condoning this type of operation is that discounted prices are freely quoted to a large portion of the public" (GX 114, R. 734, 736); and the company's letter to all of its dealers announcing its policy against the practice declared that it "result[s] in a dilution of the gross profit on each transaction which would otherwise be made by the franchised dealers" (R. 757).[16] In short, the agreement between the dealers was one directed at limiting price competition, so as to bolster their retail profit margins; such an agreement is offensive to the policy of the antitrust laws. See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221.

[16] While the court below found that General Motors was unconcerned about the retail price level at which its cars were sold (Fdg. 38, R. 1393; see, also, oral opinion, R. 1370), it also found (Fdg. 17, R. 1383–1384) that General Motors was interested in the "profit opportunity" of its dealers, which was threatened by discount house selling. The findings are reconcilable if the former means only that the company did not fix specific dealer prices; otherwise, it is plainly erroneous. "Profit opportunity" depends upon the general level of retail prices and it is clear that General Motors wanted to prevent depression of that level in any area by the development of discount house selling. In any event, the company admittedly responded to the pressure of the Losor dealers, which was motivated by fear of price competition.

To be sure, the agreement was not in form one to fix prices. Rather, it was directed toward preventing franchised dealers from selling through discount houses in the market of the high-priced, protesting dealers. But to boycott discount houses is illegal *per se* (cases cited *supra,* p. 38). Moreover, the agreement here was implemented and enforced. The dealers themselves (after General Motors attempted to stop the practice of sales through discount outlets) jointly devised and implemented methods for policing and enforcing the policy against such selling which bordered on the use of coercion (see Statement, *supra,* pp. 14–17). Thus, we have here a conscious, deliberate and eventually successful collusive effort to prevent the free play of competitive forces. Such an agreement, to repeat, is forbidden *per se* by Section 1 of the Sherman Act; and the fact that its objective was (by hypothesis) the enforcement of an otherwise lawful restraint is immaterial. See, *e.g., Fashion Originators' Guild* v. *Federal Trade Commission, supra.*

B. It is apparent that the agreement was unlikely to succeed without the cooperation of General Motors. The dealers were limited in their ability to prevent individual dealers from selling through discount houses. However other dealers might abhor the practice, they had no sanction to apply against the noncooperating dealer; only General Motors had the power to bring about "substantial unanimity among the competitors" (*United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 46–47). Because General Motors was the key to a successful conspiracy against discount house selling, the dealers concentrated on organizing as solid a

front as possible to exert effective pressure upon General Motors to enlist the company in the conspiracy. It was in response to this pressure, as we have seen, that General Motors took action against discount house selling and obtained the agreement of all Los Angeles dealers to refrain from selling through discount outlets.

The undisputed facts thus establish that General Motors participated in a single conspiracy whose other participants were competing distributors and whose objective was to stifle a significant method of price competition. The district court's finding of "unilateral" company action (Concl. 4, R. 1397) thus was erroneous as a matter of law. By acceding to the dealers' concerted request for "assistance," and indeed providing the force that effectuated the program against discount houses, General Motors "gave [its] adherence to the [dealers'] scheme and participated in it." *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226. Its acceptance "of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Id.,* at 227. See, also, *Parke, Davis & Co., supra,* at 46–47).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded for the entry of an appropriate judgment.

Respectfully submitted.

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